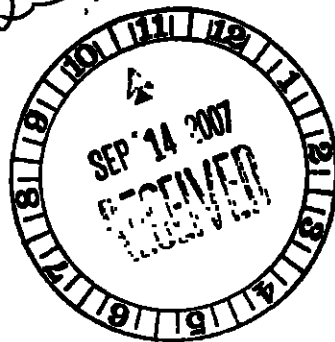


**DONALD BARTLETT SMITH
ATTORNEY AT LAW
7800 PERRY HIGHWAY
PITTSBURGH, PA 15237**

(412) 630-9742

220251



September 11, 2007

Surface Transportation Board
Secretary, Vernon A. Williams
395 East Street, SW
Washington, DC 20042

FILED
SEP 14 2007
SURFACE
TRANSPORTATION BOARD **FILED**
SEP 14 2007

Re Petition for Declaratory Order Docket # FD-35082


SURFACE
TRANSPORTATION BOARD

Dear Mr. Williams

Please find enclosed our Petition for Declaratory Order for filing, including the original and 10 copies, and a check in the amount of \$1400.00, for the filing fee. This matter has been referred to the STB by the United States Circuit Court for the Western District of Pennsylvania, Erie Division.

If you have any questions concerning this matter, please contact me at (412) 630-9742. Thank you for your attention.

Sincerely,


Donald Bartlett Smith
Attorney for Petitioners

ENTERED
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Public Record

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SEP 14 2007
SURFACE
TRANSPORTATION BOARD



BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD-35082
ABANDONMENT EXEMPTION - IN ERIE COUNTY, PENNSYLVANIA

PETITION OF VICTOR WHEELER, ET AL.,
FOR DECLARATORY ORDER

FILED

SEP 14 2007

**SURFACE
TRANSPORTATION BOARD**

FILED
SEP 14 2007
**SURFACE
TRANSPORTATION BOARD**

Filed by

Attorney Donald Bartlett Smith
7800 Perry Hwy
Pittsburgh, PA 15237
(412) 630-9742

ENTERED
Office of Proceedings

SEP 14 2007

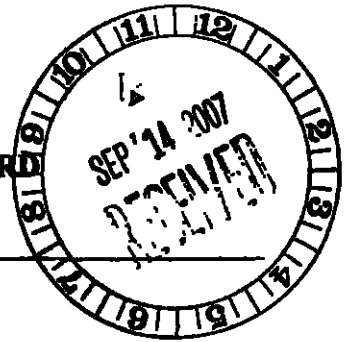
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**SURFACE
TRANSPORTATION BOARD**

BEFORE THE SURFACE TRANSPORTATION BOARD



**PETITION OF VICTOR WHEELER, ET AL.,
FOR DECLARATORY ORDER**

1 Petitioners, Victor Wheeler and Sandra J Wheeler, James K Sisson and Nancy A Sisson, Bruce D. Redfield, III, and Tamera J Redfield; and David A Warner and Tina M Warner, adult residents of the state of Pennsylvania, respectfully petition the Surface Transportation Board ("Board"), pursuant to the Board's authority under 5 U.S.C s 554 (c) and 49 U.S C s 721 (b)(4), to enter a declaratory order to terminate a controversy, and/or to remove uncertainty, as to railbanked status of the former Bessemer and Lake Erie Railroad Company easement located between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City (hereinafter, "subject property," specifically declaring that:

- (a) The agreement between Richard A Sommers, and Northwest Pennsylvania Trail Association ("NPTA"), (marked as exhibit "A" and attached hereto, and incorporated herein by reference) and for the transfer of financial and legal responsibilities, and the property interest in the easement violated the 1997 Order (marked as exhibit "B" and attached hereto, and incorporated herein by reference) and Regulations by transferring legal and financial responsibilities for the easement in consideration of an enforceable equitable interest in the easement.
- (b) Materials Recovery of Erie, Inc., (hereinafter, "Materials") abandoned the

easement by their unlawful transfer

- (c) Materials abandoned the easement by their failure to file a copy of the NITU with the STB prior to transfer of financial and legal responsibilities, and an equitable interest.**
- (d) Northwest Pennsylvania Trail Association (hereinafter, "NPTA") failed to railbank by failing to submit a Statement of Willingness with the STB**
- (e) Materials and NWPTA abandoned by failure to have the matter re-opened before the STB before transferring financial and legal responsibilities and an equitable interest**
- (f) Materials failure to meet their statutory obligations relating to taxes resulted in the abandonment of the subject property (See tax records and memo from taxing authority marked exhibit "C" and attached hereto, and incorporated herein by reference)**
- (g) Materials must make an accounting for utility easement it sold to then Pennelec, now First Energy, across the subject property despite it was an easement for railroad purposes only.**
- (h) Determination of current ownership of the subject property as the 1997 Decision of the STB at AB-88 (Sub-No 5 X) did not make an ultimate determination of ownership and deferred to the Bankruptcy Court.**
- (i) Judge Warren W. Benz of the United States Bankruptcy Court for the Western District of Pennsylvania at Bankruptcy No 94-10812-WWB specifically did not determine current ownership of the subject property (See Order of Court marked**

exhibit "D" and attached hereto, and incorporated herein by reference.)

- (j) The Penn Central Transportation Company (hereinafter, "Penn Central") abandoned the subject property when the ICC issued a Certificate and Order at AB-5 (Sub-No 22), January 17, 1973 approved abandonment, the railroad forever ceased service, and portions of the easement were sold to or otherwise possessed by private parties and, diamonds, bridges and other structures were removed. (See Certificate and Order marked exhibit "E" and attached hereto, and incorporated herein by reference)
- (k) Penn Central abandoned the subject property when they formally Noticed the ICC of their intention to terminate rail service (which had not existed since 1972) as the "Final System Plan adopted under the terms of the 1973 statute the line to which this notice relates is not designated for continued operation by Consolidated Rail Corporation or any other carrier.," and the diamonds, and other necessary structures such as bridges had already been removed (See Notice marked Exhibit "F" and attached hereto, and incorporated herein by reference)
- (l) The railroad abandoned the subject property when the Railway Association found that the subject property was not designated for any further use under the Final System Plan and the United States Bankruptcy Court approved the sale of the property
- (m) In the alternative, that the case must be re-opened and a new CITU/NITU be issued

I. THE FACTS.

2. Petitioners are the owners of property located in Erie County, Pennsylvania, which have been burdened by an easement for railroad purposes only (See Decision of the Erie Division of the West District, United States Circuit Court, marked Exhibit G and attached hereto, and incorporated herein by reference, at page 2)

3 Service ceased on the line no later than 1972 The ICC issued a certificate of abandonment in 1973, which was stayed by bankruptcy proceedings Diamonds and other necessary railroad structures were removed Penn Central gave notice of abandonment again to the ICC in 1976, as the subject property was not designated for further use by any railroad, including Conrail. The US Bankruptcy Court approved the sale of the subject property in 1976 Other structure such as bridges and crossing were removed at this time or soon thereafter.

4. *Materials failure to live up to obligations its financial and legal obligations during the 1990's and went into bankruptcy As part of the bankruptcy proceeding, a sale of utility easement was approved to Pennelec*

5 No trail has ever been developed and built

6. A Sales Agreement was executed between Materials and NPTA on September 20, 2005, giving NPTA an equitable interest in the subject property, expressly enforceable through specific performance in consideration of NPTA taking over financial and legal responsibility for the subject property

7. The Petitioners commenced an action in the United States District Court for the Western District of Pennsylvania, Erie Division. (See Complaint marked Exhibit "H" and attached hereto, and incorporated herein by reference)

8 The Court determined that the matter would be best determined by the Surface

Transportation Board and referred the matter to the STB (See Memorandum Opinion marked Exhibit "G" and attached hereto, and incorporated herein by reference.)

2. REQUEST FOR ORDER.

9 Petitioner respectfully requests the Board institute a declaratory order proceeding, then render a decision addressing the current status of the subject property and whether it has been abandoned by the actions of Penn Central, Materials, and/or NPTA, or whether Materials and NPTA must have the matter reopened. The declaratory order would terminate the controversy between petitioner and Materials and NPTA with respect to ownership and railbanked status of the subject property, and allow the case to proceed in the United States District Court for the Western District of Pennsylvania.

II. ARGUMENT.

A. Materials Abandoned the Subject Property by Transferring Financial, Legal and Managerial Responsibility, and an Enforceable Equitable Interest in the Subject Property In Violation of the Outstanding ICC/STB Orders and Regulations.

The STB Decision and Order of 1997, arose from the referral of the Bankruptcy Court for an advisory opinion, which the court decided not to follow with respect to the issue of ownership, and requires the current holder of the NITU to relinquish the NITU and have the proceeding re-opened

“(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, the then existing and future trail users shall file, jointly.

(i) A copy of the extant CITU or NITU, and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU, and issue an appropriate replacement NITU or CITU to the new trail user."

This is a verbatim recitation of regulation 49 CFR 1152.29 (f), that applies to any and all transfers of trail sponsorship and financial responsibility by any trail sponsor. Additionally, the 1990 ICC Order, paragraph 4, required the trail-sponsor for the term of their sponsorship to exercise full responsibility for management, legal liability and/or indemnification, paying the taxes assessed against the right-of-way. Paragraph 6, of the 1990 Order requires the user to send the ICC a copy of the decision, and request that it be vacated on a specific date, if the user intends to end their trail use.

Defendants sought to dismiss the plaintiffs' assertion that this regulatory requirement applies to the transfer at issue because they claim Materials never transferred its interest. Defendant's characterized the legal interest acquired by NPTA as merely the "right to use the trail" "for a period of time." This in itself would appear to be a transfer of some interest in the trail; however, Paragraph 2, of the agreement executed and entered into on September 20, 2005, speaks for itself, and is quite specific that it obligates NPTA to assume financial responsibility for the trail.

"Effective immediately and at all times prior to the conveyance date in Paragraph 1 above, grantor hereby leases the Property to Grantee to be used for any lawful purpose associated with the activities of the Grantee. In consideration of this grant of lease, Grantee hereby covenants and agrees that it will maintain the Property and pay all real estate taxes associated with the Property (including its pro rata share for any amounts previously paid by Grantor). Grantee hereby agrees to indemnify and defend Grantor from any liability associated with the use of the property unless such liability is due to the fault or negligence of the Grantor. Grantee covenants and agrees to utilize the Property as a trail under the Pennsylvania Rails to Trails Act. and thereby provide liability protection to both Grantor and Grantee as set forth at 33 Pa C S A s 5621 " [emphasis added] (See Donation Agreement marked Exhibit A)

It is important to note that the STB Order and Regulations equate *trail use* with *financial responsibility* in no uncertain terms. It is the transfer of financial responsibility that triggers the obligation under the NITU to have the proceeding reopened. It cannot reasonably be questioned that NPTA was and did assume financial responsibility as an obligation of this Agreement. The Donation Agreement which created precisely those obligations in NPTA “immediately” upon September 20, 2005. This agreement is not simply a lease, but is an agreement to donate that creates an equitable interest in the property just as an executed sales agreement with consideration does, giving rise to the remedy of equitable enforcement by either party if they breach the agreement. There are mutual obligations in the agreement that obtain immediately upon execution September 20, 2005. For these reasons the agreement explicitly provides for equitable enforcement at Paragraph 8.

“The parties acknowledge that *in the event of a breach* by either party of its obligations set forth hereunder, actual damages would be difficult or impossible to discern and therefore the *non-breaching party shall be entitled to equitable relief, including specific performance and injunctive relief* in order to compel the breaching party to abide by the terms of the Agreement.” [emphasis added] (See Donation Agreement)

Presumably, this would include enforcement of the provisions in Paragraph 1, of the Donation Agreement that calls for the conveyance of the property by deed.

Defendants attach to their motion to dismiss a conservatively worded statement about the acquisition and opening of the trail as evidence that the Defendants did not believe, and were not representing to the public, that the Donation Agreement was already legally effective; however, it is telling of Ms. Schreckengost’s real beliefs and understanding of the matter, that the *West County News-Journal*, February 23, 2006, quoted her as saying “the owner donated the property to us for use as a recreational trail.” (See article marked Exhibit “T” and attached hereto, and

incorporated herein by reference) In the *Erie Times News*, February 10, 2006, a story in which Kathy Schreckengost was quoted, reported "Materials Recovery of Erie, Inc recently deeded the trail to Schreckengost's organization " (See article marked exhibit "J" and attached hereto, and incorporated herein by reference.)

It is the belief of the petitioners that NPTA has performed at least in substantial part their financial, legal and managerial responsibilities under the agreement up to and possibly subsequent to the institution of the within lawsuit

ICC/STB jurisprudence holds that trail sponsors wishing to transfer trail responsibilities are required to re-open the matter *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA.*, AB-389 (Sub-No 1X) Upon reopening of the matter, objections of interested parties must be considered *Id.* Failure to comply with the regulations can result in the NITU being revoked *Id.*, at 907. Moreover, trail sponsor can abandon the trail through their failure to comply with their obligations

For these reasons, the District Court refused to dismiss the Petitioners' Complaint and referred the matter to the STB.

B. Materials Abandoned the Subject Property by Their Failure to Comply with the Requirement to Meet Financial, Legal and Managerial Responsibilities for the Subject Property. NPTA Failed to Communicate to the STB or the Railroad an Intention to Meet the Financial, Legal and Managerial Responsibilities; and Did Not Enter Into a Railbanking Agreement.

Materials had an obligation under the Act and Regulations to meet the financial, legal, and managerial responsibilities related to the trail 16 U S C 1247 (d); *Citizens Against Rails-to-Trails v. S.T.B.*, 267 F 3d 1144, 1149-50 (D C Cir.2001) (CART)

Materials failed to create a trail (See Study marked Exhibit K and attached hereto, and incorporated herein by reference) Materials also has repeatedly failed to meet the financial and legal obligations relating to the trail such as tax liability (See Memo and Records from taxing authority marked Exhibit C and attached hereto, and incorporated herein by reference)

NPTA has not filed a Statement of Willingness to accept the financial, legal and managerial responsibilities for the subject property; and have not entered into any type of railbanking agreement allowing for re-institution of rail service

The STB has authority to revoke a trail condition if it is shown that the statutory requirements are not being met. *See, Jost v. Surface Transp. Bd.*, 194 F.2d 79, 89-90 (D C Cir. 1999), *Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN*, Docket No AB-290 (Sub-No. 168X) (STB served May 4, 2005) (*Kokomo*).

C. The Subject Property Was Abandoned Prior to the Railbanking Through the 1973 and 1976 Authorizations and Notices of Abandonment Following Cessation of Service, and by the Dismantling of Necessary Structures and the Sale or Possession of Portions of the Line by Private Parties. Whether the Subject Property was Railbanked has not Been Determined by Either the 1997 Decision and Order of the STB or by the Bankruptcy Court.

The facts relating to the abandonment of the line by the railroad companies have been plead above and are enumerated in detail in the attached Complaint. In short, the line was subject to two abandonment proceedings before the ICC in 1973 and 1976 both after cessation of service The Railway Association determined that the line was not designated for service by any railroad in the Final System Plan. Finally, the connections between the line and currently in service line were disassembled, necessary structures such as bridges and crossings were dismantled long before the

alleged railbanking, and portions of the line were sold to or came to be possessed by private parties effectively severing the line from active lines. (See letter concerning crossing elimination marked Exhibit L attached hereto, and incorporated herein by reference)

Whether a railroad has abandoned a line hinges on the railroad's objective intent to cease permanently or indefinitely all transportation service on the line *See Birt v. Surface Transp. Bd.*, 90 F 3d 580, 585 (D C Cir 1996) In determining abandonment one looks at certain indicia: a line is fully abandoned when a certificate of public convenience and necessity is issued and has become effective, tariffs have been cancelled and operations have ceased. *Consolidated Rail Corporation v. Surface Transportation Board*, 93 F 3d 793, 798, 320 U.S.App.D.C 130, 135 (D.C Cir 1996) When the line is severed from existing lines by portions being sold or otherwise falling into private hands, and are no longer under the Board's authority. *Central Kansas Railway, L.L.C.-Abandonment Exemption-In Dedgwick County, KS*, AB-406 (Sub-No 14X). March 18, 2002

The herein petitioners intervened in Material's Bankruptcy proceedings when Materials sought to sell a power easement to Pennelec in the mid 1990's The Bankruptcy Court referred the matter to the STB for an Advisory Opinion. The STB expressly refused to exercise jurisdiction over a final determination of the issue of ownership of the subject property in the Decision and Order of May 21, 1997

"This is only an advisory opinion because the subject property is now under the jurisdiction of the bankruptcy court, which is responsible for a final determination of legal ownership." [emphasis added] (See pg. 2 of 1997 STB Decision and Order)

In short, the 1997 STB Decision and Order, reviewing the validity of the 1990 ICC Decision and Order, does not purport to decide the ultimate issue of ownership as the Defendant assumes it

does throughout their motion, and memorandum. Defendant advances no arguments concerning this point

The Bankruptcy Court, explicitly in the Court's Memorandum, and again in its own handwriting inserted into the Order, declined to rule in favor of Materials on the issue of ownership, based on the claims the herein plaintiffs asserted at that time. The Order of the Bankruptcy Court authorizing the sale reads in part, in the Court's own handwriting inserted into the proposed Order:

"Further Ordered that this Order is not an adjudication of title to the real estate being sold." [emphasis added] (See Exhibit D)

The Court's Memorandum states that they are declining to make any determination

"The Adjacent Landowners may have some rights in the property or they may have lost all rights or they may have reversionary rights or rights of re-entry for a condition broken which may ripen at some future date. The property may be "rail banked" under federal law so as to postpone the rights of the Adjacent Landowners, if any to a future time. We make no determination as to those rights. Our Order simply authorized the Debtor to sell all or a part of its interest in the land." (See Memorandum marked Exhibit "M" and attached hereto and incorporated herein by reference.)

Defendants argued before the District Court that Plaintiffs should have appealed the 1997 STB Order, or have waived the right to raise the issue of ownership, and the inextricably related issues of abandonment and railbanking. However, the STB declined to exercise jurisdiction over this issue, and the Bankruptcy Court which had jurisdiction also declined to rule against them on the issue. Therefore, Plaintiffs have not waived the right to raise this issue as a matter of procedural fact.

III. CONCLUSION

Based on the foregoing, it is clear that the Materials abandoned the subject property, and

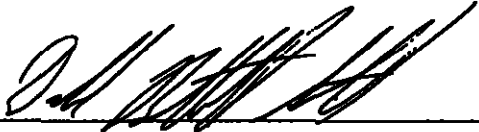
failed in its obligations such that the Board should exercise its authority to revoke the NITU and the subject property was abandoned prior to railbanking

Dated this 11th day of September, 2007

Respectfully Submitted,

Donald Bartlett Smith

Attorney for Petitioners

By 

Donald Bartlett Smith

DONATION AGREEMENT

THIS DONATION AGREEMENT is made and entered into as of the 20th day of September, 2005, by and between RICHARD A. SOMMERS, his heirs successors or assigns, whose address is 10585 Somerset Drive, Chardon, Ohio 44024, hereinafter referred to as the "Grantor", and NORTHWEST PENNSYLVANIA TRAIL ASSOCIATION, a Pennsylvania non-profit corporation, whose address is 3505 Tanager Drive, Erie, PA, 16506, hereinafter referred to as the "Grantee".

WHEREAS, the Grantor is the owner in fee simple of certain real property situated in the Township of Girard and Township of Conneaut in Erie County, Pennsylvania, consisting of approximately seven 7 miles of trail and more specifically identified in Exhibit A, attached hereto and made a part hereof (hereinafter referred to as the "Property") and Grantor desires to donate the Property to the Grantee, a non-profit, 501-(c)(3) corporation;

WHEREAS, prior to making the donation, Grantor desires to allow the Grantee to use the Property for activities associated with the purpose of the Grantee; and,

WHEREAS, the Grantor and the Grantee agree to be bound by the following terms and conditions:

1. Grantor shall convey the Property to Grantee on or before January 3, 2006 by Quitclaim deed, free and clear of all liens and encumbrances, except for restrictions of record as of the date of this Agreement, zoning ordinances, taxes and assessments not currently due and payable. Grantor's obligation to transfer the property is contingent on the Grantee's completion of all necessary rail banking documents and filings with the Surface Transportation Board to preserve the property's interim trail status.

2. Effective immediately and at all times prior to the conveyance date in Paragraph 1 above, Grantor hereby leases the Property to Grantee to be used for any lawful purpose associated with the activities of Grantee. In consideration of this grant of lease, Grantee hereby covenants and agrees that it will maintain the Property and pay all real estate taxes associated with the Property (including its pro rata share for any amounts previously paid by Grantor). Grantee hereby agrees to indemnify and defend Grantor from any liability associated with the use of the property unless such liability is due to the fault or negligence of the Grantor. Grantee covenants and agrees to utilize the Property as a trail under the Pennsylvania Rails to Trails Act (32 Pa.C.S.A. §5611 et seq.) and thereby provide liability protection to both Grantor and Grantee as set forth at 32 Pa.C.S.A. §5621.

3. In the event that the Grantee is dissolved, or otherwise ceases to exist as a non-profit organization, the property shall be donated to another similar non-profit organization to be selected by the Grantee with the reasonable approval of Grantor.

4. The Grantor agrees to have an appraisal performed at its own expense in order to determine the fair market value of the property being donated on or before the date of the closing.



Handwritten signature/initials

Handwritten text: "Sovereign" and "9300x"

5. The Grantee's obligation to accept the property is contingent upon each of the conditions set forth below on or before December 31, 2005. Inability of the responsible party to satisfy such contingencies on or before such date shall, at the option of the Grantee, render this Agreement null and void. The contingencies are as follows:

a. Grantee, at Grantee's expense, procuring a satisfactory environmental site assessment (in Grantee's sole and reasonable opinion) of the property, indicating no evidence of violations of any environmental laws, regulations or ordinances, whether federal, state or local.

b. Grantee, at Grantee's expense, procuring a wetland delineation of the Property showing no jurisdictional wetlands present upon the property that would frustrate Grantee's intended development of the property as a bicycle trail.

c. The successful close and sale of 11101 Ridge Road (Eric County Tax Index No. (24) 8-62-1.0) (i.e. the trail head) from the Grantor to the Grantee on or before September 30, 2005.

6. Grantor represents and warrants that no other party or parties has/have any possessory interests in the Property. Grantor covenants and agrees that it shall not interfere with any activities of the Grantee at the Property (assuming such activities are lawful and consistent with the terms of this Agreement) nor shall it mortgage or pledge any interest in the Property to any other party nor shall it restrict or otherwise encumber the Property in any way.

7. Grantor shall be permitted a period of 24 months from the date of the recording of the deed to re-enter the Property for the purpose of removing the cut stone tunnel from the Property. Grantor shall replace the cut stone tunnel with a 20" wide culvert. Grantor shall insure that the current stream crossing at the Property is preserved either in its present form or in a form that serves the same purpose or function. All work authorized hereunder shall be done in full compliance with all applicable environmental laws, regulations and ordinances, whether local, state or federal, including any municipal land use laws or restrictions and in a manner that presents a minimal amount of disruption to the Grantee's activities at the Property. Grantor will indemnify and defend Grantee from any liability occasioned by Grantor's negligence or Grantor's breach of this provision.

8. The parties acknowledge that in the event of a breach by either party of its obligations set forth hereunder, actual damages would be difficult or impossible to discern and therefore the non-breaching party shall be entitled to equitable relief, including specific performance and injunctive relief in order to compel the breaching party to abide by the terms of this Agreement.

9. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania.

10. If any portion of this Agreement is held to be unenforceable or invalid, the remaining portions of the Agreement shall remain in full effect.

IN WITNESS WHEREOF, this Donation Agreement has been executed and delivered as of the day and year first above written.

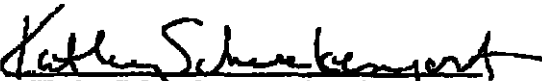
GRANTOR:



Richard A. Sommers

GRANTEE:

NORTHWEST PENNSYLVANIA
TRAIL ASSOCIATION

BY: 

Kathy Schreckengost, President

630554

EXHIBIT A

Property in Girard Township:

Erie County Tax Index No. (24) 7-22-19;

Erie County Tax Index No. (24) 7-25-6.0;

Erie County Tax Index No. (24) 8-62-11;

Erie County Tax Index No. (24) 8-63-22;

Erie County Tax Index No. (24) 20-67-24;

Erie County Tax Index No. (24) 20-68-12;

Erie County Tax Index No. (24) 21-72-3.0;

Erie County Tax Index No. (24) 21-72-4.0.

Property in Conneaut Township:

Erie County Tax Index No. (4) 5-10-11.

EXTENSION AGREEMENT

December 30, 2005

**Material Recovery of Erie Inc.
P.O. Box 1102
Chardon, Ohio 44024**

and

**Northwest Pennsylvania Trail Association
3505 Tanager Drive
Erie, Pa 16505**

Please be advised that by mutual agreement of the above referenced parties, we hereby extend the lease interest as defined in Section 2 of the Donation Agreement for the former railroad right of way in Girard and Conneaut Townships, Pennsylvania for a period of 90 days.


Material Recovery of Erie, Inc.

12/30/05
Date


Northwest Pennsylvania Trail Association

1/3/06
Date

SERVICE DATE - MAY 28, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-88 (Sub-No 5X)

BESSEMER & LAKE ERIE RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN ERIE COUNTY, PA

Decided, May 21, 1997

By petition filed on March 3, 1997, Material Recovery of Erie, Inc (petitioner) seeks to reopen this proceeding for clarification of its compliance with a notice of interim trail use or abandonment (NITU) that was issued by the former ICC on January 8, 1990. The clarification became necessary when petitioner sought to convey the railroad right-of-way it purchased from the Bessemer & Lake Erie Railroad pursuant to the NITU to the Pennsylvania Electric Company (PEC) as part of the liquidation of its estate in a proceeding before the United States Bankruptcy Court, Bankruptcy No. 94-10812-WWB. Adjacent landowners have come forward in the bankruptcy proceeding asserting that their reversionary interests in the right-of-way have vested. We are authorized by 5 U.S.C. 554 to issue declaratory orders to eliminate controversy and we will do so here.

BACKGROUND

Bessemer and Lake Erie Railroad Company (B&LE) filed a notice of exemption under 49 CFR 1152 Subpart F--*Exempt Abandonments* to abandon its 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA. A notice of exemption was served and published in the *Federal Register* on December 5, 1989 (54 FR 50284). The exemption was scheduled to become effective on January 4, 1990.

The December 5 exemption notice provided for the filing of trail use/rail banking requests by December 15, 1989, and public use requests by December 26, 1989. On December 21, 1989, petitioner filed a request for issuance of a notice of interim trail use and for a public use condition. Petitioner satisfied the requirements of 49 CFR 1152.29 by submitting a statement of willingness to assume financial responsibility and by acknowledging that use of the right-of-way is subject to possible future restoration for rail service. Petitioner also satisfied the requirements under 49 CFR 1152.28(a)(2) for imposing a public use condition. Because B&LE indicated its willingness to enter into negotiations with petitioner, a NITU was issued providing directives for implementing interim trail use/rail banking and imposing a public use condition.

Petitioner notes that most acquisitions for trail use are entered into after a NITU is issued. Here, B&LE entered into an agreement of sale on August 14, 1989, and the property was conveyed to petitioner by quit claim deed on December 20, 1989. Petitioner points out that the sale agreement contained provisions making the sale of the right-of-way contingent upon ICC abandonment approval and third party offers to purchase the right-of-way for continued rail service. Petitioner

The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903 and 16 U.S.C. 1247(d). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.



contents that the written exchange—its request for NITU on December 12, 1989, and B&LE's consent on January 3, 1990—effectively modified the terms of the sale agreement. We agree Transfer of the property could not have legally occurred prior to January 4, 1990 (the effective date of the abandonment exemption). Here, a NITU was imposed *before* B&LE was authorized to effect abandonment, thus preserving the agency's jurisdiction over the right-of-way. Based on the evidence presented, we conclude that the property has not reverted to adjacent landowners. This is only an advisory opinion because the subject property is now under the jurisdiction of the bankruptcy court, which is responsible for a final determination of legal ownership.

Although the right-of-way is subject to liquidation as an asset of petitioner's estate in the bankruptcy proceeding, petitioner states that any agreement of sale between PEC and itself would require the continued preservation of the right-of-way for recreational use by the public or for reconversion to rail use. We agree. Thus, if the court permits the sale of the right-of-way to PEC, then, to ensure continued rail banked status of the right-of-way, petitioner and PEC must comply with 49 CFR 1152.29(f) which says:

- (1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly,
 - (i) A copy of the extant CITU or NITU, and
 - (ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.
- (2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

It is ordered:

1. This proceeding is reopened and clarified.
2. The 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA, is rail banked pursuant to 16 U.S.C. 1247(d).
3. This decision is effective on May 28, 1997.

4. A copy of this decision will be mailed to
United States Bankruptcy Court
for the Western District of Pennsylvania
1602 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222

Re: No 94-10812

By the Board, Chairman Morgan and Vice Chairman Owen

Vernon A Williams
Secretary

DEAN C. RONEY
GIRARD TOWNSHIP TAX COLLECTOR
GIRARD TOWNSHIP BUILDING
10140 WEST RIDGE ROAD
GIRARD, PA 16417

11/10/99

DURING the tax year of 1998
I DID NOT Recieve any TAX Payments.
for or from the MATERIAL Recovery
Group for any PROPERTY LOCATED
in the township of GIRARD

All un-paid parcels were then
turned over to ERIE County tax
claim on FEBRUARY 3rd 1999.

Dean Roney



GIRARD TOWNSHIP

10140 Ridge Road

Girard, Pa. 16417

Phone: (814) 774-4738

Fax: (814) 774-0637

James and Nancy Sisson

11244 Springfield Road

Girard, PA 16417

November 13, 1998

Dear Jim and Nancy:

As of now there are no plans for Rails to Trails to use the old B&LE R/R Lines.

No agreement was ever accomplished. If we can be of any further help, please feel free to contact the Township.

Sincerely,

Betty
Betty Bell

in accordance with In re Abbotts Dairies of Pennsylvania, Inc., 788 F2d 143 (C A. 3, 1986).

IT IS ORDERED, ADJUDGED AND DECREED that the private sale of the real and personal property described as follows is hereby confirmed to:

Real Property - Pennsylvania Electric Company of 1001 Broad Street,
Johnstown, PA 15907, and

Personal Property - RAM Recycled Materials, Inc. of 1202 West 16 Street,
Erie, PA 16502

free and divested of the liens hereinabove described, and that the Attorney for Debtor make, execute and deliver to the purchaser above named the necessary deed and/or any other document required executed by the appropriate officer of the debtor to transfer title to the property purchased upon compliance with the terms of sale; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above recited liens, be, and they hereby are, transferred to the proceeds of sale, if and to the extent they may be determined to be valid liens against the sold property, and that the within decreed sale shall be free, clear and divested of said liens; and that after due notice to the lien creditors, and no objection on their parts having been made, the costs of sale ~~and the within bankruptcy proceedings~~ be paid in advance of any distribution to said lien creditors.

FURTHER ORDERED that moving party shall serve a copy of the within order on each respondent (i.e., each party against whom relief is sought) and its attorney of record, if any, upon any attorney or party who answered the motion or appeared at the hearing, the trustee, if any, the attorney for the trustee, if any, the attorney for the debtor, the purchaser, and the attorney for the purchaser, if any, and file a certification of service.

Further Ordered that this Order is not an adjudication of title to the real estate being sold.

*Upon sale of the Trust.
all monies. The Debtors shall
pay \$1539.82 to Erie
Diesel and Fuel Service, Inc.*

Warren W. Bentz
Warren W. Bentz
United States Bankruptcy Judge

c: William T. Morton, ESq.
Brian McGowan, Esq.
George L. Cass, Esq.
Susan Reiter, Esq.
Donna Leone, Esq.
Office of the U. S. Trustee



FEB 9 1973

SERVICE DATE
FEBRUARY 7, 1973

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review
Board Number 5, held at its office in Washington, D. C.,
on the 17th day of January, 1973

AB-5 (Sub-No. 22)

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR.,
AND WILLARD WITZ, TRUSTEES OF THE PROPERTY OF PENN.
CENTRAL TRANSPORTATION COMPANY, INC., ABANDONMENT
BETWEEN GEWARD JUNCTION AND JAMESTOWN IN MERCER,
CRANFORD AND ERIC COUNTIES, PENNSYLVANIA

Upon consideration of (1) the application filed under
section 21(5) of the Interstate Commerce Act, on April 4,
1972, by George P. Baker, Richard C. Bond, Jervis Langdon,
Jr., and Willard Witz, Trustees of the Property of Penn.
Central Transportation Company, Inc., a common carrier
by railroad, subject to Part 1 of the Act, for a certificate
of public convenience and necessity permitting abandonment
of operations over tracks of the Erie and Pittsburgh Rail-
road Company beginning at mile post 129.7 near Gizard Junction
and extending to mile post 90.5 near Jamestown, districts of
10.7 miles, Lancaster, Cranford and Eric Counties, Pennsylvania;
(2) the order entered July 7, 1972, assigning the proceeding
for handling under modified procedure; (3) verified statements
filed by the applicant, and (4) jointly by protestants,
Commonwealth of Pennsylvania and Pennsylvania Public Utility
Commission; and (5) applicant's reply to the said verified
statements; (6) protocol filed by the Brotherhood of Railway,
Airline and Steamship Clerks, Freight Handling Agents and
Station Employees, Congress of Railway Unions and Railway
Labor Executives' Association on the ground that the proposed
abandonment, if permitted, would have an adverse effect upon
the employees of the applicant; and (7) protestants' petition
dated November 1, 1972, to supplement its request for oral
hearing, and reply thereto;

It is ordered, That in the verified statements filed by
Commonwealth of Pennsylvania and Pennsylvania Public Utility
Commission the following arguments are presented: (a) Over-
head traffic revenue was omitted from the financial information
relating to the branch to be abandoned; (b) the proposed
abandonment is contrary to conditions imposed in Pennsylvania
R. Co. v. McKee, New York Central R. Co. 327 U.S. 475 (1966);
(c) because the line will not be abandoned by the owner of
the line, Erie & Pittsburgh Railroad Co., a dangerous situation
at crossings will result; and (d) that a discrepancy exists
in applicants' rehabilitation expense estimates;

PCAB-Exhibit, R. 1

EXHIBIT



It further appears, that the arguments of protestants do not present a basis for further formal proceedings inasmuch as the material facts relied on by applicant, and challenged by the protestants, are a part of the present record to which we have given due and careful consideration, including the following: (a) overhead traffic routing is a matter of temporary duration and would be of possible significance only to the extent alternate routes would be more costly and thus affect shipper interests; and that, inasmuch as there are no shipper protests, financial data applying to the branch line lines, are the principal criteria in determining the need for the line a distance of 11 miles; Pacific Railroad Company, also known as the Iowa and Central, Kansas and Missouri, 324 U.S.C. 157 (1945); (b) there has been a critical change of circumstances in Form Central Transportation Co. (a Kansas corporation) due to its present state of bankruptcy, and this situation is pertinent to which the application has been filed by the trustees of the estate, superseding the earlier disposition of the aforesaid conditions in the Form Central report, supra; (c) Little Valley Railroad Company, 338 U.S.C. 793; (d) no substantive evidence has been presented by protestants to substantiate their claim that a dangerous condition will exist as a result of operations are abandoned while the line remains intact; but even if so, that situation would not be of great enough significance to warrant denial of the application; and (e) the record shows that any discrepancy in applicant's rehabilitation costs was the result of typographical error and that the costs, as corrected, are accurate and reasonable according to approved standards;

It further appears, that the evidence of record submitted by applicant shows that declining and decreasing amounts of traffic have been transported over the line in recent years (71, 32 and 14 carloads in 1970, 1971, and the first 3 months of 1972, respectively), averaging about 2 carloads per week and less than 2 carloads per mile per year; that adequate alternate rail and motor carrier service is available on county and state roads, including State Highways 6, 38, 321, 285 and Interstate 75, and a rail line at applicant's local track facilities at Jamestown, Pa.; that net losses attributable to the line have been substantial, viz., in 1970, \$31,820 in 1971 and \$7,329 for the first 3 months of 1972; that applicant estimated rehabilitation costs in excess of \$526,000 needed to continue operation and actual roadway maintenance expense of \$1,100 per mile; that the carrier's financial information, accordingly, clearly shows the line is unprofitable and in need of extensive rehabilitation; and that no shipper has filed a verified statement in opposition to the application nor has

the evidence shows otherwise that there is a compelling need for continued rail service;

It is further appearing, that this Commission has an obligation to prevent improvident and unnecessary expenditures for maintenance and operation of lines not needed to insure adequate service of Chenoweth & Ohio Ry. v. United States, 283 U.S. 35, 42 (1931); and also Washington & Old Dominion R. v. Abandonment, 331 U.S. 587, 600 (1968); that there is no foreseeable prospect of future traffic volume and revenues sufficient to make operation of the line profitable and to recover the substantial expenditures needed for rehabilitation, if the line continues to operate; and that, under the circumstances, continued operation, maintenance, and rehabilitation of the line is not economically justified, and would constitute an undue and unnecessary burden on applicant and upon interstate commerce;

It is further appearing, and the Board so finds, that the interests of employees will be protected by the imposition of appropriate conditions, and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

Therefore, and good cause appearing therefor, the Board so finds, and

It is hereby certified that, subject to the new conditions for the protection of employees as set forth in Chicago, B. & O. R. Co. Abandonment, 257 E.C.C. 700, the present and future public convenience and necessity permit the abandonment by George B. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wicks, Trustees of the Property of Penn Central Transportation Company, of operations over the above described line of railroad;

It is ordered, that protestant's petition to supplement request for oral hearing, herein be, and it is hereby, denied;

It is further ordered, that this certificate and order shall take effect and be in force from and after 35 days from the date of service hereof; and that tariffs applicable to the line over which operations herein permitted to be abandoned may be cancelled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in a manner prescribed in regulations of the Interstate Commerce Act;

No. 25-3 (Sub-No. 22)

It is further ordered, that when filing schedules concerning tariffs applicable to said line, the applicant shall in each schedule refer to this certificate and order by date and order number.

It is further ordered, that if the authority granted is exercised, the applicant shall submit for the consideration and approval of this Commission within 60 days thereafter, two copies of the Journal entries showing the retirement of the line from its services, and

It is further ordered, that, if the authority granted in this certificate is not exercised within one year from its date, it shall be of no further force or effect.

By the Commission, Review Board Number 5.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Not a Notary
Office
Harold S. [Signature]
Prothonotary
Crawford County

NOTICE

The Trustees of Penn Central Transportation Company hereby give notice, pursuant to Section 304(a) of the Regional Rail Reorganization Act of 1973, of their intention, effective February 27, 1976 to terminate all rail service on the V&P Branch between Linesville (Milepost 103.6), and Thornton Jct., Pa. (Milepost 129.3), in the State of Pennsylvania. In the Final System Plan adopted under the terms of the 1973 statute the line to which this notice relates is not designated for continued operation by Consolidated Rail Corporation or any other carrier.

Copies of materials and information bearing on the value of this line of railroad and upon the revenues and expenses associated with its operation in recent years (prepared in conformity to regulations of the Rail Services Planning Office of the Interstate Commerce Commission) are on file at the Penn Central Transportation Company offices, in Room 908 Penn Central Station, Grant St. & Liberty Ave., Pittsburgh, Pa. 15222, where such data may be examined by interested persons during regular business hours.

ROBERT W. BLANCHETTE, RICHARD C. BOND
AND JOHN H. MCARTHUR, TRUSTEES OF THE
PROPERTY OF PENN CENTRAL TRANSPORTATION
COMPANY, DEBTOR.

EXHIBIT
[Handwritten mark]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

VICTORIA WHEELER, *et al.*,

Plaintiff,

v.

MATERIAL RECOVERY OF ERIE, INC., *et al.*,

Defendants.

C.A. No. 06-85 Erie
District Judge McLaughlin

MEMORANDUM OPINION

McLAUGHLIN, SEAN J., J.

This matter is before the Court upon a Motion to Dismiss or, in the alternative, for Summary Judgment, filed by Defendants' Northwest Pennsylvania Trail Association and Material Recovery of Erie, Inc., as well as Motions to Dismiss filed by Defendant FirstEnergy Corp and by Defendant Canadian National Railway.¹

I. BACKGROUND

A. The Federal Railbanking Law

In 1983, Congress enacted Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d) (hereinafter, the "Railbanking Act") to preserve the country's rapidly disappearing railway corridor infrastructure for future rail service and energy efficient transportation uses by permitting inactive corridors to be used on an interim basis as trails. The Railbanking Act is triggered when a railroad desires to terminate its common carrier obligation to provide freight rail service on a line,

¹ Given our ultimate decision to refer this matter to the Surface Transportation Board for the reasons discussed *infra*, we do not address the merits of the other arguments advanced by FirstEnergy and Canadian National Railway.



an action requiring approval from the Surface Transportation Board ("STB").² 49 U.S.C. § 10903. When a qualified entity desires to negotiate with the railroad concerning the preservation of a corridor for future rail and interim trail use, it must request that the STB issue a railbanking order (known as a Certificate of Interim Trail Use ("CITU") or, as in this case, a Notice of Interim Trail Use ("NITU") by filing a statement of willingness to assume legal or financial responsibility over the corridor until such time as it is needed again for rail service. 49 C.F.R. § 1152.29(a)

Railbanking is voluntary on the part of the railroad. The Railbanking Act does not require the railroad to transfer the right of way for that purpose, nor impose any new obligations or restrictions on the railroads. Rather, it allows the railroad to choose to discontinue rail operations "for an indefinite period while preserving the rail corridor for possible reactivation of service in the future," Preseault v. ICC, 494 U.S. 1, 6 n.3 (1990), or to fully abandon the right of way and thereby permit state laws of reversion to take effect. Where a NITU or CITU is issued and a railbanking agreement is concluded, the corridor remains subject to the federal authority of the STB for so long as the trail use continues, and the corridor remains intact and potentially available for reactivated rail service. Burt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996)

B. Factual Background

This case involves a six-mile long strip of land (the "Trail") that, prior to 1973, served a railway line owned and operated by Penn Central Railroad. Penn Central did not hold title to the land in fee simple, but rather, according to Plaintiffs, possessed an easement for railroad purposes, obtained by condemnation awards and releases. The Plaintiffs are the owners of the parcels of land adjacent to the Trail, as well as possessors of the reversionary interests in the Trail itself.

In 1973, Penn Central petitioned for, and was granted, permission to abandon service on the line. (Complaint ¶ 17). In 1976, Penn Central quitclaimed the Trail and the railway line to

² Prior to the creation of the STB by Congressional act effective January 1, 1996, this role was filled by the Interstate Commerce Commission.

Bessemer & Lake Erie ("B&LE"), a subsidiary of Defendant Canadian National Railway. From 1976 until 1989, the Trail remained unused. (Complaint ¶ 21).

In August, 1989, B&LE entered into a contingent agreement with Defendant Material Recovery to convey its quitclaim interest in the Trail to Material Recovery as part of the process of railbanking the Trail. (Complaint ¶22). On January 8, 1990, the Surface Transport Board ("STB") granted a NITU to B&LE and, subsequently, the Trail was properly railbanked and transferred to Material Recovery. (See January 8, 1990 Decision of the Interstate Commerce Commission ("1990 ICC Decision"), Complaint, Ex. B; Complaint ¶ 24). From 1990 to 1997, Material Recovery salvaged what remained of the railway line and removed the underlying fill, but, according to Plaintiffs, never developed hiking or biking trails on the Trail. (Complaint ¶ 25).

In 1997, Material Recovery entered into bankruptcy and, as part of the bankruptcy proceeding, sought leave to grant the Pennsylvania Electric Company ("Penelec") a utility easement over the Trail. (Complaint ¶ 26; Complaint, Ex. D). While in bankruptcy, the Plaintiffs intervened in the bankruptcy proceeding and asserted that their reversionary interests in the Trail's right of way had vested prior to 1990 as a result of the railway line falling out of use. (Complaint ¶ 27). The Bankruptcy court referred the Plaintiffs' challenge to Material Recovery's ownership of the Trail to the STB and, in 1997, the STB reopened the 1990 proceedings and issued a decision clarifying and re-affirming the railbanked status of the Trail.

Essentially, the STB reviewed the history of the Trail described above and concluded that, in 1990, the Trail had been properly railbanked. (1997 Decision of the Surface Transportation Board ("1997 STB Decision"), Complaint, Ex. C). It further stated that, "[b]ased on the evidence presented, we conclude that the property has not reverted to adjacent landowners." (Id.). The STB couched its decision as an "advisory opinion" because it recognized that the property was under the jurisdiction of the bankruptcy court, and that, therefore, the final determination of legal ownership rested with that court. The STB further observed that "any agreement of sale between [Materials Recovery and Penelec] would require the continued preservation of the right-of-way for recreational

use by the public or for reconversion to rail use” and that “to ensure continued rail banked status of the right-of-way, [Materials Recovery and Penclec] must comply with 49 C.F.R. 1152.29(f) . . .”.

(Id.). The Opinion, thereafter, quoted the applicable regulation, which provides that:

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

- (i) A copy of the extant CITU or NITU; and
- (ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(Id.). (citing 49 C.F.R.1152.29(f)).

Ultimately, the bankruptcy court permitted Material Recovery to sell a utility easement over the Trail right-of-way to Penclec, but declined to make a determination as to ultimate ownership. (Bankruptcy Court Order, Complaint, Ex. D).

In 2005, Material Recovery and the Northwest Pennsylvania Trail Association (“NWPTA”) entered into an agreement whereby the NWPTA purchased property other than the Trail from Material Recovery. In addition, the parties entered into a separate agreement styled a “Donation Agreement” that contemplated the future donation of the Trail to NWPTA on or before January 3, 2006. (Agreement of Sale and Donation Agreement, Defendants’ Concise Statement of Material Facts, Exs. D and E). Due in large measure to the pendency of this lawsuit, the Trail was never donated pursuant to the terms of the Donation Agreement.

On April 11, 2006, Plaintiffs filed this suit, alleging that Materials Recovery and the NWPTA had violated the provisions of 49 C.F.R. 1152.29(f) by transferring ownership of the Trail

without fulfilling the regulatory requirements described therein. Plaintiffs assert jurisdiction under 28 U.S.C. § 1336(a) and 28 U.S.C. § 1331.

II. STANDARD FOR REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In order to withstand a motion for summary judgment, the non-moving party must "make a showing sufficient to establish the existence of [each] element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In evaluating whether the non-moving party has established each necessary element, the Court must grant all reasonable inferences from the evidence to the non-moving party. Knabe v. Boury Corp., 114 F.3d 407, 410, n.4 (3d Cir. 1997) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. (quoting Matsushita, 475 U.S. at 587).

III. ANALYSIS

The engine that drives the present suit is the Plaintiffs' conviction that, prior to 1990, the various properties comprising the Trail had been legally abandoned under Pennsylvania state such that their reversionary interests were triggered. In essence, they believe that the Trail was improperly railbanked in 1990, and that, therefore, the 1997 STB decision erred in re-affirming the Trail's railbanked status (See Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss ("Memo in Response"), Dkt. # 15, pp. 18-21)

However, pursuant to 28 U.S.C. §§ 2321 and 2342(5), an order of the STB is subject to exclusive review in the United States Court of Appeals in the Circuit within which the property is

located. Id. "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title." 28 U.S.C. § 2342(5). Thus, absent a timely appeal to the appropriate Circuit Court, an STB order cannot be directly or collaterally attacked in any other court. See B.F. Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349, 1352-53 (3rd Cir. 1970).

Having failed to perfect a timely appeal of the 1990 ICC and 1997 STB orders to the Court of Appeals for the Third Circuit, Plaintiffs rely on 28 U.S.C. § 1336(a), which states that "the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board. . ." Id. In this instance, Plaintiffs are seeking to enforce the directive in the 1997 STB advisory opinion that required the parties to comply with the applicable regulatory provision for a transfer of ownership of a railbanked property, 49 C.F.R. 1152.29(f). Counsel for Plaintiff conceded this point at oral argument:

The Court: As I understand it, your position is that the NWPTA and Material Recovery are in violation of the language at page 2 of [the 1997 STB order], which sets forth the language of 49 C.F.R. 1152.29, is that correct?

Counsel: That and similar language from the 1990 as well.

(Transcript of Hearing on Motion to Dismiss ("Transcript"), January 18, 2007, p. 28).

This regulatory provision, as described above, requires the STB to "reopen the abandonment or exemption proceeding" as part of the procedure for transferring ownership of a railbanked property to a new trail user. By filing this suit under § 1336(a), Plaintiffs essentially seek a declaration that Material Recovery and the NWPTA violated the 1997 Order by transferring ownership without complying with the cited portion of 49 C.F.R. 1152(f) and that, as a result of this violation, the Trail has been abandoned.

The Court: Is it fair to say that primarily, and we'll talk about other issues if you think it necessary, but is it fair to say that primarily what the

plaintiff is seeking to do here is enforce in this court the 1997 order of the STB, and in seeking to enforce that order, asking for a declaration from me that there has been noncompliance, material noncompliance with its terms and conditions?

Counsel: That's primarily what we're concerned with.

(See Transcript, p. 25).

While we acknowledge that 28 U.S.C. § 1336 properly vests jurisdiction in this Court to enforce the 1997 STB Order, our jurisdiction to determine whether there has been a violation of the regulatory provisions cited therein is not exclusive. In their summary judgment motion, Defendants' argue that primary jurisdiction for claims arising from 49 C.F.R. 1152.29 rests with the STB and that, accordingly, it would be proper to refer this matter to the STB for determination. Primary jurisdiction is a legal doctrine pursuant to which Courts may refer matters within the specialized purview of an administrative agency to that agency. United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956). A referral is particularly appropriate where the issue involved implicates the specialized knowledge of an administrative agency and when the referral would help maintain uniformity in decision making. Atlantis Express, Inc. v. Standard Transp. Servs., Inc., 955 F.2d 529, 532-33 (8th Cir. 1992).

Each of the issues raised - whether the Donation Agreement and subsequent use of the Trail by the NWPTA triggered the requirements of 49 C.F.R. 1152.29, whether 1997 STB Order has been violated, and, ultimately, and whether either of those events might result in an abandonment and reversion of the Trail to the Plaintiff property owners - are precisely the type of issues that the STB routinely considers. See, e.g., Barclay v. U.S., 443 F.3d 1368, 1374 (Fed. Cir. 2006) ("The disposition of reversionary interests [is] subject to the [STB's] exclusive and plenary jurisdiction to regulate abandonments of railroad rights of way."); Grantwood Village v. Missouri Pacific R. Co., 95 F.3d 654, 657 (8th Cir. 1996) ("The ICC has exclusive and plenary authority to determine whether a rail line has been abandoned. . ."). Plaintiffs do not dispute that a referral to the STB would be

appropriate here, but instead argue that practical considerations should militate against it, as demonstrated by the following exchange:

The Court: Who better, particularly given the intricacies of the Railbanking Act, if you will, and it is a rather, let's just say it's somewhat of a niche in the overall regulatory scheme, who better to determine what was meant by its own order, and who better to determine whether there has or has not been compliance with the provisions of the Railbanking Act . . . than the very entity whose responsibility it is on a weekly basis to determine whether parties are or are not in compliance; isn't it the STB, rather than this court?

Counsel: In this particular case the District Court is going to have to, in the event that there's an appeal, make a final decision based on a number of the same arguments, and it's more a matter of a practical matter related to a financial concern for both parties, frankly, I think.

The Court: It really isn't your position, is it, that under all the facts here, the STB does not possess certain unique expertise here, which all things being equal, it would be appropriate to go to. It really is your position that, look it, judge, this has been going on for a lot of years and the shortest distance between two points is a decision by you, rather than you deferring in the first distance to the STB?

Counsel: I could not have put it better myself.

(Transcript, pp. 37-38).

We are certainly not unmindful of these concerns. Nonetheless, in light of the STB's institutional knowledge of this particular case as a result of having considered these issues in both 1990 and 1997, their familiarity with their own 1990 and 1997 orders, and their general experience in dealing with issues of this nature, we find that the benefits of referring this matter to the STB significantly outweigh the burdens.

IV. CONCLUSION

For the foregoing reasons, the Defendants' respective motions to dismiss or, in the alternative, for summary judgment are DENIED and this matter is referred to the Surface Transportation Board for further proceedings.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

VICTORIA WHEELER, <i>et al</i> ,)	
)	
Plaintiff,)	
v.)	C.A. No. 06-85 Erie
)	District Judge McLaughlin
MATERIAL RECOVERY OF ERIE, INC., <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

AND NOW, this 30th day of March, 2007, and for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendants' Material Recovery of Erie, Inc., *et al.*, the Motion to Dismiss filed by Defendant FirstEnergy, and the Motion to Dismiss filed by Defendant Canadian National Railway, are DENIED. This matter is referred to the Surface Transportation Board for further proceedings.

IT IS FURTHER ORDERED that the clerk of Court is Directed to mark this case closed.

/s/ Sean J. McLaughlin
United States District Judge

cm: All parties of record.. nk

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA, ERIE DIVISION**

**VICTOR WHEELER and SANDRA J WHEELER; and
JAMES K. SISSON and NANCY A. SISSON; and
BRUCE D REDFIELD, III, and TAMERA J. REDFIELD;and
VINCENT J. BARTOSEK and PATTY BARTOSEK; and,
DAVID A. WARNER and TINA M. WARNER;**

PLAINTIFFS,

CIVIL ACTION #

VS

COMPLAINT

**MATERIAL RECOVERY OF ERIE, INC.,
RICHARD A. SOMMERS, PRESIDENT; and**

**NORTHWEST PENNSYLVANIA TRAIL ASSOCIATION,
KATHY SCHRECKENGOST, PRESIDENT; and**

PENNSYLVANIA ELECTRIC COMPANY; and

FIRSTENERGY CORP ; and

CANADIAN NATIONAL RAILWAY COMPANY,

DEFENDANTS

COMPLAINT AND DEMAND FOR JURY TRIAL

AND NOW comes, the Plaintiffs, by and through their attorney, Donald Bartlett Smith, Esq., in support of this Complaint, and aver as follows:

- 1 The action arises under U.S C., Title 28, Judiciary and Judicial Procedure, Part IV Jurisdiction and Venue, Chapter 85, District Courts: Jurisdiction, s 1336 Surface Transportation Board's orders, as hereinafter more fully appears. 28 U S C s. 1336 (a), states, "the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board.. "**
- 2 Plaintiffs rights are affected by the Decision and Order, and by the non-compliance of the defendants, therefore, they are among the classes of persons who have**



standing to maintain a suit under s. 1336 (a), of the statute which creates a cause of action for enforcement of STB orders.

3. This action also arises under the National Trails System Act (hereinafter "NTSA"); U.S.C., Title 16, s. 1247 (d); and the federal regulations promulgated pursuant to the Act: C.F.R., Title 49 s. 1152.29 (f), as hereinafter more fully appears. The plaintiffs' claims turn on the application of the NTSA and related regulations, and therefore, give rise to federal question jurisdiction pursuant to 28 U.S.C. s. 1331
4. Plaintiffs Victor and Sandra J. Wheeler, husband and wife, (hereinafter the "Whealers") reside at RR 1, Girard, PA 16417, and own property in the County of Erie, Pennsylvania. They claim a property interest in a former railroad right-of-way
5. Plaintiffs James K. Sisson and Nancy A. Sisson, husband and wife, (hereinafter the "Sissons") reside at 11224 Springfield Rd., Girard, PA 16417, and own property in the County of Erie, Pennsylvania. They claim a property interest in a former railroad right-of-way.
6. Plaintiffs Bruce D. Redfield, III, and Tamara J. Redfield, husband and wife, (hereinafter the "Redfields") reside at 11253 Neiger Road, Girard, PA 16417, and own property in the County of Erie, Pennsylvania. They claim a property interest in a former railroad right-of-way
7. Plaintiffs Vincent J. Bartosek and Patty Bartosek, husband and wife, (hereinafter the "Bartoseks"), reside at 11261 Springfield Rd., Girard, PA 16417, and own property in the County of Erie, Pennsylvania. They claim a property interest in a former railroad right-of-way
8. Plaintiffs David A. Warner and Tina M. Warner, husband and wife, (hereinafter the "Warners") reside at 11241 Springfield Rd., Girard, PA 16417 and own property in the County of Erie, Pennsylvania. They claim a property interest in a former railroad right-of-way.
9. Defendant Material Recovery of Erie Inc., (hereinafter "Materials"), maintains an office at 24 Main St. East, Girard, PA 16417, and is a Pennsylvania corporation that claims to now or formerly have a property interest in a former railroad right-of-way in the County of Erie, Pennsylvania, also claimed by plaintiffs
10. Defendant Richard A. Sommers, (hereinafter "Mr. Sommers"), resides at 338 S. Hamden, Chardon, PA 44024, and is the President of Materials Recovery of Erie, Inc
11. Defendant Northwest Pennsylvania Trails Association, (hereinafter "NPTA"), an

address of P.O. Box 9401, Erie, PA 16505, is a Pennsylvania corporation that claims to have a property interest in or right to use a former railroad right-of-way in the County of Erie, Pennsylvania

12. Defendant Kathy Schreckengost, (hereinafter "Mrs Schreckengost"), who resides at 3505 Tanger Dr , Erie, PA 16506; and is the President of the Northwest Pennsylvania Trails Association.
13. Defendant Pennsylvania Electric Company (hereinafter "Penelec"), maintains an office at 5404 Evans Road, Erie PA 16509, and is a Pennsylvania Corporation that claims to have a property interest in a former railroad right-of-way in the County of Erie, Pennsylvania
14. Defendant FirstEnergy Corp , (hereinafter "FirstEnergy"), maintains headquarters in Akron, OH, has a mailing address at FirstEnergy Corp., 76 South Main Street, Akron, OH 4438, and a designated agent: C T Corporation System, 1300 E 9th St , Cleveland, OH 44114, and is an Ohio corporation. Penelec is a subsidiary of FirstEnergy
15. Canadian National Railroad Company, (hereinafter "CN"), which is headquartered at 935 de La Gauchetiere St. West, Montreal, QC H3B 2M9, CANADA, is a Canadian corporation and the successor corporation to the Bessemer and Lake Erie Railroad, having acquired the latter, which claims to now and formerly have a property interest in a former railroad right-of-way in the County of Erie, Pennsylvania
16. The former right-of-way was owned by Penn Central Railroad at the date of its original abandonment in 1973.
17. In 1973, Penn Central Petitioned for, and was granted, an abandonment for their railroad line from Girard to Jamestown in Erie, Crawford, and Mercer counties, which was no longer in use. This included the herein disputed portion from Lexington to Lake City, in Erie County The line was formally abandoned through Decision and Order of the ICC, which required that the abandonment be consummated within one year of the effective date of the Order. (A copy of the Decision is marked Exhibit "A " and is attached hereto and incorporated herein by reference)
18. Penn Central did not use the railroad right-of-way again subsequent to this Order, dismantled connections to active lines, and began to disassemble the line.
19. In 1976, Penn Central quitclaimed its interest in the Lexington to Lake City portion in Erie County to Bessemer & Lake Erie (hereinafter "B&LE")

20. Penn Central quitclaimed the remainder of the Girard to Jamestown line to private parties who salvaged the personalty and/or took possession of whatever interest Penn Central had
21. From 1976 through 1989, Bessemer & Lake Erie did not use the Lexington to Lake City line. Simultaneously they caused or permitted trestles, bridges, and crossings to be dismantled and removed. Vegetation and trees were allowed to grow between the tracks. Through the actions of Penn Central, and in turn Bessemer & Lake Erie, the use of the right-of-way became impossible.
22. In August 14, 1989, Bessemer & Lake Erie entered into a contingent agreement with Materials to convey by quitclaim their interest to Materials if the ICC would approve railbanking for the Lexington to Lake Erie line, so that Materials could use or lease the right-of-way for a utility easement
23. On December 5, 1989, subsequent to entering into the agreement for sale with Materials, B&LE filed a notice of exemption for the Lexington to Lake City portion of the right-of-way, and in their notice they made no reference to the 1973 Decision and Order granting abandonment to the same portion of right-of-way
24. On January 8, 1990, the STB granted a Notice of Interim Trail Use to Bessemer & Lake Erie, again with no reference to the 1973 ICC abandonment, or the possibility that abandonment had been consummated. (See Decision marked Exhibit "B" and attached hereto and incorporated herein by reference.)
25. Materials salvaged what remained of the line, and removed the ballast and underlying fill, and never developed hiking or biking trails
26. Materials filed for bankruptcy before the United States Bankruptcy Court, at Bankruptcy No. 94-10812, as they could not meet their financial obligations, including their tax liabilities for the right-of-way they were obligated to meet as per the National Trails System Act.
27. While in bankruptcy, the herein plaintiffs intervened in the bankruptcy proceeding asserting that their reversionary interests in the right-of-way had vested. Materials petitioned the STB to reopen 1989-1990 abandonment proceeding in order to clarify their compliance with the NTU that was issued on January 8, 1990. The STB held that Materials was in compliance with the NTU, but left the final determination of property ownership and the possibility of reversion to the Court, as their opinion was only advisory and the Court had jurisdiction over this issue. (A copy of the Decision and Order of the STB is marked Exhibit "C" and attached hereto, and incorporated herein by reference.)
28. The Bankruptcy Court allowed Materials to enter into an agreement with Penelec

for use of the former right-of-way as a power easement, but explicitly stated in the Order that they were not making a final determination of who owned the right-of-way. (A copy of the Court's Order is marked Exhibit "D" and attached hereto, and incorporated herein by reference)

29. The agreement Materials had with Penelec required Materials to develop and open trails on the right-of-way. This was never done
30. Some time in late 2005 or early 2006 NPTA entered into an agreement with Materials to take ownership, possession and control of the right-of-way in order to develop hiking and biking trails on it, and NPTA began to advertise and promote the use of the right-of-way as a trail in the print and electronic media.
31. This action concerns the status of the Lexington to Lake City portion of the former right-of-way between survey Station 308+85 and Survey Station 6+00. It concerns the rights and duties of the respective parties pursuant to the 1973 ICC Decision and Order, the 1990 ICC Decision and Order, the 1997 STB Decision and Order, and the Order of the Bankruptcy Court, together with the relevant deeds, federal and state legislation, and case law concerning the ownership interests that the respective parties have in this former right-of-way, and what right the respective parties have to possess, use and control the right-of-way

COUNT I

ACTION TO ENFORCE ORDER OF THE STB PURSUANT TO 28 U.S.C. § 1336 (A).

32. Plaintiffs incorporate by reference paragraphs 1-32 and 36-78 as though fully set forth herein.
33. The acts complained of in Count I are the violation of the 1997 Decision and Order of the Surface Transportation Board (see Exhibit "C"), and 49 CFR 1152.29 (f), requiring that:

"(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU, and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an

appropriate replacement NITU or CITU to the new trail user " (See Decision and Order marked Exhibit "C" at pg. 3)

34. Defendants Materials and NPTA have conveyed in print media of public record that they have assumed ownership and control of the right-of-way in order that NPTA is developing and operate hiking and biking trails. NPTA has also advertised and invited the public in local and regional newspapers and through television, to use the right-of-way as a hiking and biking trail.
35. Defendants Materials and NPTA are in violation of the Decision and Order of the STB as they have: failed to file a copy of the existing NITU; failed to file a Statement of Willingness to Assume Financial Responsibility by the new trail user; failed to indicate the date on which they did or will transferred responsibility

WHEREFORE, plaintiffs pray this Court make a finding that the defendants are in violation of the STB's Decision and Order; enter an order enjoining the use of the right-of-way by NPTA; enter an Order enforcing compliance with the Decision and Order of the STB if it is found that STB still had jurisdiction at the time of its issuance; and such other relief that the Court sees fit.

COUNT II
ACTION FOR DECLARATORY JUDGMENT PURSUANT TO
TITLE 28, U.S.C., s. 2201, and F.R.C.P. RULE 57.

36. Plaintiffs incorporate by reference paragraphs 1-36 and 43-78 as though fully set forth herein.
37. Federal action for Declaratory Judgment provides for the determination of the existence of any right, duty, power, liability, privilege, disability or immunity or of any fact upon which such legal relations depend or of a status. Construction and interpretation of written instruments, including contracts, is a principal function of a declaratory judgment proceeding.
38. Pursuant to the 1997 Decision and Order of the STB quoted in averment #33 above, Materials and NPTA have a duty to comply with this Decision and Order and relinquish the outstanding NITU, have the matter re-opened and request a new certificate. Failure to do so frustrates the plaintiffs' legal right under the statute, regulations, and order to intervene in the matter as protestants. Defendants' failure to comply denies plaintiffs of a procedural safeguard that was intended in part to protect the rights of the plaintiffs, such as their constitutional right to property.
39. Defendants, in prior litigation at Bankruptcy No. 94-10812 before this Court in bankruptcy proceedings, asserted rights of ownership and control of this property that would defeat the claims of the defendants. This Honorable Court did not make

a final determination of ownership and entered an Order explicitly stating that it did not make this determination. (See Order marked Exhibit "D")

- 40 Prior and subsequent to the Order of Bankruptcy Court referenced above, certain defendants made admissions to the STB and admissions to the parties, that they did not own the former right-of-way in fee, if at all, and that one or more of the plaintiffs may own the former right-of-way, other defendants actively asserted their interest in the right-of-way in opposition to the claims of the plaintiffs.
- 41 Plaintiffs herein seek declaratory relief concerning the legal rights of the parties in the former right-of-way pursuant to the pertinent federal statutes including: NTSA, 4 R Act, ICC Act, and state law, in requesting this they also seek declaratory relief concerning the facts upon which these rights turn, including: what title the railroad acquired to the right-of-way, when and if there has been an abandonment under federal and/or state law; and if the current and former use and alleged ownership by the defendants of the right-of-way has a legal basis under the NTSA
42. Plaintiffs herein seek declaratory relief concerning the interpretation of the ICC/STB Decisions and Orders, deeds, agreements, records, state acts, federal statutes, and case law that created the rights and duties of the respective parties in this case.

WHEREFORE, Plaintiffs request this Honorable Court to issue a judgment or decree declaring:

- A) that the railroad only acquired easements for railroad purposes running over the properties of the plaintiffs' predecessors in interest,**
- B) that the plaintiffs are the successors in interests to the parties whose land was subject to these easements;**
- C) that these easements could be extinguished, and that the property would revert to the plaintiffs upon abandonment by the railroads;**
- D) that the ownership interest held by the Plaintiffs gives them standing as parties whose interests are affected to enforce the Decision and Order of the STB, and laws and regulations to which this Order related;**
- E) that the current use and ownership claimed by NPTA is in violation of the law, including, the 1997 Decision and Order of the STB, and federal statute and regulation,**
- F) that the following Acts of the Commonwealth (hereinafter the "Pa Acts") - Acts Nos. 495 and 482, of Session of 1858, Pennsylvania, April 1, 1858, and April 28, 1858, respectively, incorporating the Erie and Pittsburgh Railroad Company; Act of Session of**

1842, Pennsylvania, April 12, 1842, incorporating the Erie and North East Railroad Company; Act No 586, of Session of 1856, Pennsylvania, April 22, 1856, supplementing the Act incorporating the Erie and North East Railroad Company; Act No. 76, of Session of 1849, Pennsylvania, February 19, 1849 - determine the respective rights and duties of the parties herein, in concert with any deeds and agreements that exist or existed;

G) that the former use and ownership claimed by Materials was in violation of the law, or unsupported by the law;

H) that Penn Central Railroad abandoned the former right-of-way under federal law, prior to their conveyance of a quit claim deed to Bessemer & Lake Erie;

I) that Penn Central Railroad abandoned the former right-of-way under state law, prior to their conveyance of a quit claim deed to Bessemer & Lake Erie;

J) that Bessemer and Lake Erie abandoned the former right-of-way under federal and state law, prior to their conveyance of a quit claim deed to Materials,

K) that Materials did not acquire any interest in the former right-of-way itself;

L) that Penn Electric Company did not acquire any interest in the former right-of-way, since Materials had no interest in the real property to convey;

M) that NPTA did not acquire any interest in the former right-of-way, since Materials had no interest in the real property to convey;

N) that CN retains no interest in the former right-of-way;

O) that the ICC/STB lost jurisdiction over the former right-of-way subsequent to the 1973 Decision and Order authorizing abandonment, or subsequent to a de facto state abandonment prior to 1989;

P) that the easement has been extinguished and the right-of-way over the plaintiffs' properties has reverted to the plaintiffs;

A jury trial is demanded on the issue of abandonment

COUNT III

PETITION FOR PERMANENT INJUNCTION PURSUANT TO RULE 65.

43. Plaintiffs incorporate by reference paragraphs 1-42 and 48-78 as though fully set forth herein.

44. Pursuant to 28 U.S.C. § 1336 (a), district courts are given jurisdiction to enforce

the orders of the STB. Materials and NPTA are in violation of the 1997 Decision and Order

- 45 The plaintiffs rights are affected by the violation of the order, and they are being denied their right to procedural due process by being denied of their right to intervene as protestants under the administrative procedure and their right of judicial review, as provided for under the statute and regulations
- 46 There is a real danger that the plaintiffs will suffer irreparable harm by having their property taken without just compensation and losing their right to administrative and judicial review, if the defendants are permitted to continue in their actions.
- 47 There is no adequate remedy at law by which plaintiffs can address the defendants violation of the decision and order

WHEREFORE, plaintiffs pray this Court issue an Order granting a permanent injunction against the defendants use of the former right-of-way so long as they are in violation of the 1997 Decision and Order; and against the use of the property of the plaintiffs by the defendants if it is determined that the right-of-way has been extinguished.

COUNT IV
ACTION FOR TRESPASS, JOINT TRESPASS, CONTINUING TRESPASS AND
DAMAGES

- 48. Averments 1-47 and 64-78 of the Complaint are incorporated herein by reference and made a part hereof, as though fully set forth herein
- 49. Plaintiffs are owners of the former right-of-way. They are the successors to the reversionary interests of the persons' who first granted easements or had easements condemned for railroad purposes. Plaintiffs have communicated their claim of right repeatedly to the defendants.
- 50. Since 1990, Materials and Mr. Sommers have repeatedly and continuously represented that they have an ownership interest in the former right-of-way, and have leased it to one or more ATV and snowmobile clubs and their members, including ATV Traction and Triangle Snowmobile.
- 51. Materials and Mr. Sommers induced and invited others to enter onto the former right-of-way as it crosses the property of the plaintiffs.
- 52. ATV and Snowmobile users have wrongfully entered onto the former right-of-way and the plaintiffs' property surrounding it as a direct and proximate cause of the defendants' inducements and invitations.

53. **Materials and Mr. Sommers have leased and then donated the former right-of-way to NPTA**
54. **Materials and Mr. Sommers have induced and invited others to enter onto the former right-of-way as it crosses the property of the plaintiffs through their purported lease and donation**
55. **As a consequence of the willful, wanton, malicious and knowing joint trespass of Materials, the plaintiffs have suffered a loss of use and quiet enjoyment of their property, an invasion of their privacy, and a diminution of the value of their property**
56. **Beginning in 2005, NPTA, its agents, employees, and volunteers at their direction have entered on to the property of the plaintiffs in a portion of the former right-of-way as it traverses their property, and continue to as of this to date**
57. **The conduct of NPTA, which was willful, wanton, malicious and with knowledge, has caused the plaintiffs a loss of the use and quiet enjoyment of their property, an invasion of their privacy, a conversion of fill material, and a diminution of the value of their property.**
58. **On January 26, 2006, February 10, 2006, and February 23, 2006, and at other times, NPTA, and Ms. Schreckengost have in print media and electronic media advertised for use of the public and has invited the public to enter onto the former right-of-way as it crosses the property of the plaintiffs.**
59. **Unidentified members of the public have unlawfully entered onto the properties of the plaintiffs as a direct and proximate cause of the promotion and invitation of NPTA and Ms. Schreckengost.**
60. **The conduct of NPTA, which was willful, wanton, malicious and with knowledge, has caused the plaintiffs a loss of the use and quiet enjoyment of their property, an invasion of their privacy, and a diminution of the value of their property.**
61. **B&LE, now CN, represented that they owned an interest in the realty within the former right-of-way, and have purported to convey an interest in it to Materials.**
62. **By representing they owned an interest in the realty within the former right-of-way, and by purporting to convey it, B&LE has induced and invited others to enter onto the properties of the plaintiffs, and others have unlawfully entered the plaintiffs' properties as a direct and proximate cause of this inducement and invitation.**
63. **As a consequence of the willful, wanton, malicious and knowing joint trespass of**

B&LE, now CN, the plaintiffs have suffered a loss of use and quiet enjoyment of their property, an invasion of their privacy, and a diminution of the value of their property

WHEREFORE, Plaintiff demands judgment against the defendants, in an amount in excess of \$100,000 00, including punitive damages and the costs of this action

COUNT V
SLANDER OF TITLE

- 64 Plaintiffs incorporate by reference paragraphs 1-63 and 70-78 as though fully set forth herein
- 65 The actions of Materials and Mr Sommers in representing to Penelec and NPTA that they own the former right-of-way, and purporting to convey the same, has disparaged and slandered the title of the plaintiffs
- 66 The public and private statements of Materials, Mr. Sommers, NPTA and Ms. Schreckengost, that they own and/or have leased an interest in the former right-of-way, and their promotion and invitation to the public to use the same in print and electronic media, has disparaged and slandered the title of the plaintiffs
- 67 The preparation of, delivery, and recording of instruments that purport to convey title or an interest in the former right-of-way by Materials, Penelec, and NPTA, has disparaged and slandered the title of the plaintiffs
- 68 The defendants Materials, NPTA, Ms Schreckengost, and Penelec negligently, willfully, wantonly, with reckless disregard, and knowing the falsity of their claim, in malice slandered the title of the plaintiffs.
69. The plaintiffs have suffered damages as a result of the defendants' misrepresentations that were calculated to deceive the public and the plaintiffs. The damages consist of the diminution of the value of their properties and the impairment of their ability to alienate their properties, and by interference with the peaceful enjoyment of their properties and invasion of their privacy.

WHEREFORE, Plaintiff demands judgment against the defendants, in an amount in excess of \$100,000.00, including punitive damages and the costs of this action.

COUNT V
CLAIM FOR UNJUST ENRICHMENT AND REQUEST FOR ACCOUNTING

- 70 Plaintiffs incorporate by reference paragraphs 1-69 and as though fully set forth herein

- 71 B &LE, now CN, received and retained \$55,000 00 dollars from Materials in consideration of the sale of the former right-of-way that they did not own that they had been entrusted with pursuant to the easement agreements and the Acts of the Commonwealth
- 72 Materials, received and retained \$110,000 00 dollars from Penelec in consideration of an agreement to grant a utility easement within the former right-of-way, when Materials did not own a real property interest in the former right-of-way
73. Plaintiffs' predecessors in interest conveyed or had condemned by the railroad a title in their property consisting of an easement for railroad purposes. Such title was to be extinguished and the claim was to be relinquished at the time of the abandonment of the right-of-way, as defined by the Acts of the Commonwealth
- 74 Railroad's successors in interest or purported successors in interest, Materials and Penelec have refused to relinquish their claim of interest in the former right-of-way. Instead they have each in turn attempted to sell this interest for money and other valuable consideration.
- 75 Defendants knew that they legally retained and received no right to the real property within the former right-of-way, yet attempted to convey them for profit.
76. Defendants have retained the benefit in the former right-of-way, have realized the value of the benefit, and have kept the proceeds from the right-of-way
77. As a direct and proximate cause of this attempted sale of the plaintiffs' property interests in the right-of-way, defendants have been unjustly enriched
- 78 It would be unjust for the defendants to be allowed to retain the proceeds from their attempted sale of the plaintiffs' property interests

WHEREFORE, Plaintiff pray this Honorable Court order the defendants to make a complete and accurate accounting of the profits defendants have received from the marketing and sale of plaintiffs' property interests, and order the return of these proceeds, including the aggregate amount of \$165,000.00 above, by which defendants have been unjustly enriched, plus interest and attorney's fees and the costs of this action

Respectfully Submitted



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February 23, 2006

West County News-Journal

Group plans bike path on former west county railroad track

By Becky Fink

For Kathy Schreckengost, an old, abandoned railroad track is much more than it appears to be.

Schreckengost, who works with the Northwest Pennsylvania Trail Association, plans to turn a 7-mile strip of otherwise unsuitable land into a bike path.

The proposed trail will stretch from the entrance of the Erie Bluffs State Park, west of Lake City, south through Girard Township.

"A study was done by the City Planning Commission in 2000, and we found out that there were some trails that were available to turn into paths, and some rail corridors that were available," explained Schreckengost. "Erie was the only county in Pennsylvania that did not have any Rails to Trails."

The Northwest Pennsylvania Trail Association worked closely with the Presque Isle Cycling Club to determine how to get a trail in Erie County. Besides the proposed trail in west county, the association is in the process of working on a trail in Corry.

Donations from Chivers Construction Company, and Girard Township helped to make this west county purchase possible. Rick Sommers of Materials Recovery of Erie Inc., previous owner of the 15 acre parcel, has also signed a donation agreement with the Trail Association for 7 miles of the railroad right of way. The Trail Association intends to improve and develop this rail corridor and property into a recreational Rail-to-Trail with a trailhead and parking on the Route 20 property.

The west county project, according to Schreckengost, could take as long as ten years to develop. "To have the trail fully improved will take about five to ten years," she explained. "But it is possible to hike on the trail currently in some select sections."

The trail will offer residents the opportunity to bike, walk, horseback ride, and cross-country ski through their hometown.

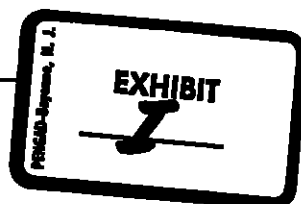
Schreckengost explained that the rail was acquired from the Materials Recovery System.

"The tracks were owned by the Materials Recovery Corporation," she said. "They went in and took out all the rails, ties and some sub-base material and sold it for recycling. Then, the owner donated the property to us for use as a recreational trail."

Additionally, the NWPTA purchased property on Route 20 to use as parking for the trail.

"We are really trying to develop alternate ways of transportation besides driving a car," said Schreckengost. "Once the trail is finished, it may be a great way to get into work for some residents. If we can get some people to try the trail, then it might help the environment."

Girard Township supervisor Bill Felage mentioned that he believes the trail would be beneficial to the township. "I think in the long range of things, it will be beneficial to the township," he said. "I think you'll see more people coming into Girard Township. It will allow for public access, and recreational access. These things will really help the community."



FRIDAY
February 10, 2006

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Erie Times-News

City & Region

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LINE

Bike path on track

Crash with ambulance leads to citations

An Erie man was cited for drunken driving in an accident that damaged a Millbrook Paramedic Service ambulance on its way to Saint Vincent Health Center on Thursday morning.

The accident happened shortly after 2:30 a.m. Thursday, when a Honda Civic traveling west on West 26th Street went through a red light and hit the ambulance, which was northbound on Myrtle Street, police said.

Two paramedics aboard the Ford F-450 ambulance were transporting a non-emergency patient, who was not injured in the accident, MSPB officials said. Ambulance driver Kevin Kerr, 33, of Edinboro, and another paramedic, whose name was not available, were taken to Saint Vincent and Elmer Medical Center for treatment of minor injuries.

Police said the driver of the Honda, Charles Harrison, 23, of the 3300 block of Sigbee Street, was cited for drunken driving.

Driver jailed after police chase in east Erie

An Erie man who police said is known for driving without a license was jailed Thursday accused of leading officers on a chase.

Rashed L. Williams, 29, of the 2400 block of Reed Street, was charged with fleeing and eluding police, escape, and a variety of traffic violations, including driving without a license. He was arrested at West 26th and Myrtle streets.

Group plans new route on old railroad bed

By PETER PANEPISTO
peter.panepisto@erietimes.com

GHARD — Kathy Schreckengost looks at abandoned railroad beds and sees miles of opportunity.

The beds offer wide-open space for bicyclists, hikers and runners to stretch their legs and soak in fresh air.

They offer a chance to reuse land that might otherwise get neglected.

The challenge, of course, is navigating a million-inch succession of potholes and hurdles that stand between abandoned rails and usable trails.

Schreckengost's volunteer organization, the Northwest Pennsylvania Trail Association, is set to confront those logistical challenges along a 7-mile strip that stretches from the entrance of Erie

Jiffy State Park, west of Lake City, and runs southward through Girard Township.

Materials Recovery of Erie Inc. recently decided the trail to Schreckengost's organization — an offshoot of the Presque Isle Cycling Club — along with 15 acres of property near the entrance to the state park.

"The nice thing about it is, it comes out right near Route 8, where the Erie High State Park is," Schreckengost said. "We should be able to connect those two, allowing bicyclists to go from the park to the trail."

The project, called the Crooked Creek Trail, is the organization's second fall-to-spring

The Northwest Pennsylvania Trail Association is also in the process of converting a former railroad path in Corry into a multi-use trail.

> Please see PAGE 2B

Rail to trail?

Likely route for proposed bicycle trail in Girard Township.



ERIC TIMMONS

File swap leads to bust

Man arraigned child-porn charges

By JIM GARNOLL
jim.garnoll@erietimes.com

A 30-year-old Erie man resigned on child-porn charges after state troopers learned that his computer file cabinet had hundreds of image files that depicted child victims in sex acts.

Police said James Owens, 33, of the 700 block of West Gore Road, was arraigned Wednesday before Erie County Judge LeBauer on 20 counts of abuse of children and 20 of criminal use of computer. Owens was taken to Erie County Prison, 4300,000, state police.

Police said Owens is ready to file for a probation violation.

State Police Trooper Darben, a member of the E Computer Crime Unit, reported the investigation on Dec. 28 with a search of pornography files being on the Gustafson file network.

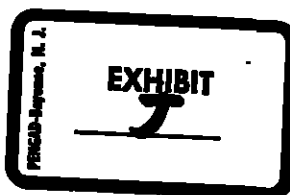
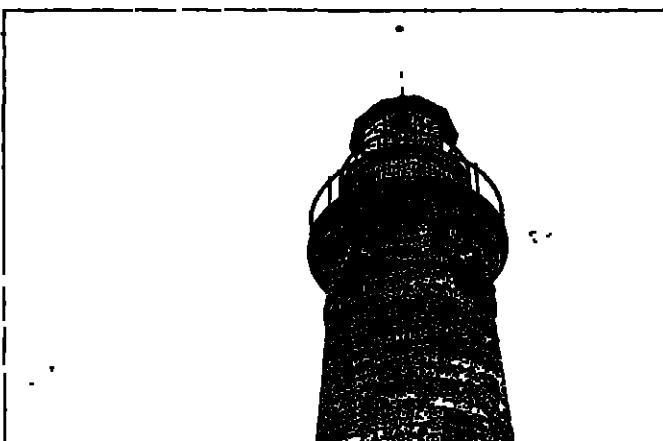
Gustafson is a so-called peer network, allowing computer users to share files with one another without

Bright idea

Port sees lighthouse as beacon for tourists

By KARA RHODES
kara.rhodes@erietimes.com

The Erie Land Lighthouse once flashed warnings to ship

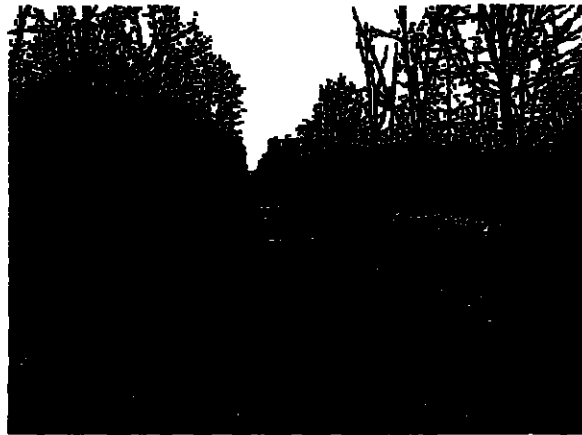


EXHIBIT

Thornton Junction Trail Corridor

Physical Description

The Thornton Junction Trail Corridor (also referred to as the Girard to Albion Trail Corridor) is part of the abandoned Bessemer and Lake Erie Railroad corridor. At one time, it was part of the Erie and Pittsburgh Branch that was abandoned in 1973 (DCNR, 2002). If developed the trail could potentially connect the Seaway Trail to the southwestern part of the county. Currently, this corridor is being used by ATVs through an agreement with Material Recovery Group, as well as being informally used as a trail by cyclists and walkers. The average width of the trail is 8 to 10 feet wide and in fair condition. The railroad ties and ballast have been removed.



Typical Corridor

A potential trailhead could be developed south of Girard Junction near Fairview Evergreen Nurseries. There is available space to develop a trailhead with parking facilities and other amenities. This location is attractive due to its accessibility to PA Route 5. The Erie County Trails and Greenways Plan proposed this trail corridor as a potential connector to the Seaway Trail along Route 5.



Culvert at Bottom of Gap

The options to address the Crooked Creek Valley gap include construction of a bridge or extensive filling and grading. Both options are estimated to cost over \$3 million and it is recommended that alternative routes be identified in order to make this a viable trail for ADA requirements.

The trail narrows south of the gap to a width of 6-8 feet. The issue in this section of the corridor is the major drainage problems the length of the trail from Cross Station Road past Springfield Road to Neiger Road. The trail would need to be graded to even it out as well as culverts built to drain the trail of excess water. There is an at-grade crossing at Springfield Road that is similar to Cross Station Road. Adequate signage would be enough to warn both motorists and trail users to ensure safety. The same is true of the at-grade crossing at Neiger Road. The trail at this point is posted with a sign stating that Triangle-S Snowmobile Club and the property owners are maintaining it.

was removed



Severe Drainage Issues on Trail

**PENN CENTRAL
TRANSPORTATION COMPANY**

ROBERT W. BLANCHETTE • RICHARD C. BOND • JOHN H. MCARTHUR • TRUSTEES

Suite 2900, IVB Building
1700 Market Street
Philadelphia, Pa. 19103
Phone: 215 - 972 - 3078

February 9, 1978

RDBR 2434

Mr. L. W. Petulla, P.E.
District Engineer
District 1-0
Commonwealth of Pennsylvania
Department of Transportation
Franklin, Pennsylvania

Dear Mr. Petulla:

This will acknowledge your letter dated January 5, 1978 .
requesting permission for a grade crossing removal project on
the Jamestown Secondary Track, south of Linesville, Pa. involv-
ing L.R. 20006.

I am enclosing a copy of the Notice under which abandonment
was consummated in accordance with the provisions of Section 304(b)
of the Regional Rail Reorganization Act of 1973, as amended.

In the interest of highway safety, Penn Central Transportation
Company will permit the Commonwealth of Penna., Department of Trans-
portation to abolish the crossing subject to the following condi-
tions:

1. The rail, ties and other track materials may be removed from the crossing, and the rail and other ferrous materials removed may be stored on the adjacent railroad right-of-way in such manner that they will not present a hazard to pedestrian or vehicular traffic.
2. Crossbucks and other grade crossing warning signs should be removed, with those belonging to Penn Central being stored on the adjacent right-of-way.

PC0669



Mr. L. W. Petulla, P.E.
District Engineer
Commonwealth of Pennsylvania

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February 9, 1978

3. The crossing area will be repaved.
4. All work in connection with this project will be performed by or at the direction of the Department of Transportation and will be at no expense to Penn Central Transportation Company.

Very truly yours,

(Sgd.) W. J. Dixon
W. J. Dixon
Director
Rail Asset Development

bc: E. L. Claypole - Refers to your endorsement to me of Mr. Petulla's letter.

R. Szwajkos - As information.

J. J. Supon - Refers to your letter of January 31 to Mr. Petulla, copy to Mr. Claypole.

PC0670



validity or extent of Debtor's title in the Property upon which GPU is purchasing as an easement. If the Debtor owns the fee, then it may properly convey an easement.

The Adjacent Landowners have filed objections to the Disclosure Statement. They assert that they have ownership rights in the Property and that this Court should determine those rights which would, in turn, prohibit the transfer of any interest of the Debtor.

If the Adjacent Landowners have an interest in the property upon which the Debtor is conveying an easement, then that interest is not impaired by the Sale Order nor by the Plan of Reorganization.

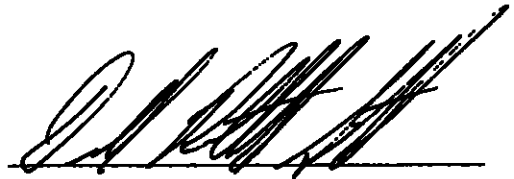
The Adjacent Landowners may have some rights in the property or they may have lost all rights or they may have reversionary rights or rights of re-entry for a condition broken which may ripen at some future date. The property may be "rail banked" under federal law so as to postpone the rights of the Adjacent Landowners, if any, to a future time. We make no determination as to those rights. Our Order simply authorized the Debtor to sell all or a part of its interest in the land. That Order became final long ago.

We find that the Disclosure Statement adequately informs creditors of the Debtor's intentions. If the Adjacent Landowners have rights which have not been adjudicated by the Surface Transportation Board, those rights remain in effect and are not eradicated by the Debtor's Disclosure Statement and Amended Plan and can be pursued in a non-bankruptcy forum.



VERIFICATION

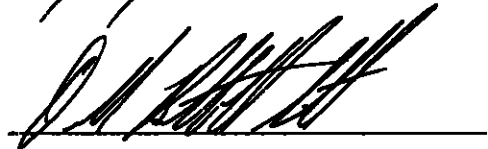
I, Donald Bartlett Smith, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading. Executed on September 11, 2007

A handwritten signature in black ink, appearing to read "Donald Bartlett Smith", is written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail

9/11/07

A handwritten signature in black ink, appearing to read "Donald Bartlett Smith", is written over a horizontal line.